PD-0561-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/2/2019 8:15 PM
Accepted 1/7/2019 10:07 AM
DEANA WILLIAMSON
CLERK

No. PD-0561-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/7/2019
DEANA WILLIAMSON, CLERK

LISANDRO BELTRAN DE LA TORRE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Colorado County
Cause No. 01-17-00218-CR

* * * * *

STATE PROSECUTING ATTORNEY'S
BRIEF ON THE MERITS

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

EMILY JOHNSON-LIU
Assistant State's Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Lisandro Beltran de la Torre.

* The trial judge was Hon. William D. Old, III, Presiding Judge, 25th District Court, Colorado County, Texas.

* Counsel for Appellant at trial were Carlos Rodriguez and Celenne Beck, Romero and Associates, 3601 Navigation Blvd, Houston, Texas 77003.

* Counsel for Appellant on appeal in the court of appeals and in this Court is Steven J. Lieberman, 712 Main St., Suite 2400, Houston, Texas 77002.

* Counsel for the State at trial were Jay Johannes and Carolyn Olson, Colorado County Attorney's Office, 400 Spring Street, Suite 204 West, Columbus, Texas 78934.

* Counsel for the State before the Court of Appeals was Jay Johannes, Colorado County Attorney, 400 Spring Street, Suite 204 West, Columbus, Texas 78934.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

No. PD-0561-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

LISANDRO BELTRAN DE LA TORRE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Colorado County
Cause No. 01-17-00218-CR

* * * * *

STATE PROSECUTING ATTORNEY'S
BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant argues that the trial court gave a jury instruction on joint possession that singled out the State's evidence and theory of the case and then denied a similar defensive instruction on mere presence, thereby undermining his defense. The real difference in the instructions, however, is not that one was helpful to the State and the other to the defense. It is that the joint-possession instruction informed the jury

of an aspect of the law otherwise unmentioned in the charge that the State was entitled to rely on for conviction and the refused instruction on mere presence was necessarily implicit in the general charge. The judgment of both the trial court and the court of appeals should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has not been granted.

STATEMENT OF THE CASE

Appellant was indicted for possessing less than a gram of cocaine. CR 10. The court's charge instructed the jury that two or more people could possess the same controlled substance at the same time. CR 51. The trial court denied Appellant's request for a "mere presence instruction." 3 RR 29-30. He was convicted and received mandatory probation. 3 RR 70; 4 RR 4-5. On appeal, Appellant challenged the denial of the one instruction and the inclusion of the other. The court of appeals affirmed.[1]

APPELLANT'S GROUNDS GRANTED FOR REVIEW

1. "The Court of Appeals erred in holding the trial court did not improperly comment on the evidence by providing a jury instruction

[1] *Beltran de la Torre v. State*, 546 S.W.3d 420 (Tex. App.—Houston [1st Dist.] 2018).

on 'joint possession' that added to the statutory definition of 'possession.'"

2. "The Court of Appeals erred in alternatively holding it was not error to refuse Appellant's requested jury instruction on 'mere presence' while holding the jury instruction on 'joint possession' was appropriate."

STATEMENT OF FACTS

Officers Jose Lara and Anthony Axel responded to a call about people drinking in a car outside a driver's license office. 2 RR 159-60, 190-91; 3 RR 14-15. Upon approaching the vehicle, Officer Lara saw through the driver's side window a little greenish-blue baggie containing a powdery substance. 2 RR 161, 170. It was on top of other items in an open compartment in the console between the front two seats. 2 RR 169, 180-81; SX 2, SX 3. Appellant was in the driver's seat; he had one front- and one back-seat passenger. 2 RR 160, 164-65, 192. He owned the car. 2 RR 172; 3 RR 21. He smelled of alcohol. Both he and the front-seat passenger had dilated pupils, which the officers believed resulted from ingesting a narcotic. 2 RR 171, 175, 196-97, 208; 3 RR 16.

While Officer Lara was speaking to Appellant, a man approached the vehicle. 2 RR 162-64, 179. Officer Lara thought he came from the driver's license office and asked the man if he was with Appellant and his two female passengers. The man said no and was allowed to leave. 2 RR 163-64; 3 RR 14.

Appellant and the two women were arrested. 2 RR 196-98. Lab results showed the baggie contained cocaine and weighed .02 grams. 2 RR 229-31.

During *voir dire*, the prosecutor told the panel,

> [P]ossession, care, custody, and control does not mean ownership. . . . More than one person can possess a controlled substance at the same time. However, if there's joint possession then there must be facts that affirmatively link the accused to the contraband. Such as the contraband is in plain view. It is conveniently accessible to the accused. The physical condition of the accused that [sic] may indicate that they have recently consumed contraband.

2 RR 63. Defense counsel's *voir dire* suggested how two people can both be in possession of a pen. 2 RR 106-107. He explained that if one of them does not realize the pen is also a flashlight, then he cannot knowingly possess the flashlight. 2 RR 106-07. He told the panel "mere presence, simply being in the presence, being close to, being in an area, that that by law is not enough for possession." 2 RR 107.

At trial, Appellant testified that a man called "Leo" had been in the backseat shortly before police arrived. 3 RR 21. He said that the baggie was not his and that he neither saw or knew it was in his car. 3 RR 23-25.

The definition section of the jury charge included the instruction: "'Possession' means actual care, custody, control, or management. Two or more people can possess the same controlled substance at the same time." CR 51. No one referenced this instruction at the charge conference. 3 RR 29-30. Appellant asked

for an instruction on "mere presence"; it was denied. 3 RR 29-30.

In closing argument, the prosecutor reiterated that a controlled substance can be possessed by more than one person and "in this situation that's what we have." 3 RR 45. Defense counsel suggested that Appellant's backseat passenger had thrown the cocaine into the console and gotten out of the car just as the police were approaching. 3 RR 56-58. He argued that if Appellant had known the cocaine was there, he would have removed or tried to conceal it. 3 RR 62-63.

On appeal, the court of appeals held that the inclusion of the joint-possession instruction in the charge was proper because "possession" legally includes "joint possession" and jurors should not be free to define "possession" in a manner inconsistent with its legal meaning.[2] It held that the mere presence instruction was properly denied because it merely negated an element—care, custody, or control—and was not statutorily required.[3]

SUMMARY OF THE ARGUMENT

Both the trial court and court of appeals were correct in permitting a joint-possession instruction and omitting one on mere presence. While neither instruction

---

[2] 546 S.W.3d at 427.
[3] *Id*. at 426.

is statutory, the joint-possession instruction has the distinction of not otherwise being covered by the general charge. Without this instruction, some jurors may require the State to prove sole possession, which would unnecessarily increase the State's burden of proof and restrict its theories of liability. In contrast, charging the jury on the statutory definition of possession necessarily informs them that mere presence in a place where narcotics are found does not itself constitute possession. The general charge already gave the defense ample room to argue mere presence and would not mislead jurors, as might occur if the court singled out the circumstance of mere presence for particular attention. Even if it was erroneous to instruct the jury on joint possession, such error did not result in egregious harm, given that both practitioners told the jury possession could be joint. Similarly, the refusal to include a mere presence instruction did not result in some harm since it was implicit in the charge and, on these facts, jurors were unlikely to believe that Appellant's sole connection to the cocaine was his presence in the car.

ARGUMENT

ISSUE 1

It was not an improper comment on the evidence to instruct the jury on the law of joint possession. Despite the absence of a statutory basis for the instruction, it was law applicable to the case because, like the law of parties, it was legal theory that the State was entitled to rely on for conviction.

The State was entitled to submission of an available legal theory not otherwise covered by the general charge.

In a felony case tried to a jury, the judge shall deliver "a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury."[4] Joint possession is part of the "law applicable to the case."

The Controlled Substances Act (like the Penal Code) defines "possession" as "actual care, custody, control, or management."[5] It does not require exclusive possession. At the same time, it does not expressly include joint possession either. But joint possession is indisputably the law. Its application in possession of

---

[4] TEX. CODE CRIM. PROC. art. 36.14.
[5] TEX. HEALTH & SAFETY CODE § 481.002(38); TEX. PENAL CODE § 1.07(a)(39).

contraband cases pre-dates the modern Penal and Health and Safety Codes.[6] In conjunction with the Controlled Substance Act's statutory definition of "actual control, care, and management," this Court has repeatedly held that the State does not have the burden to prove sole possession.[7] Practitioners routinely convey this law to jurors in *voir dire* and closing argument, and while this Court has not addressed the propriety of such a practice, several courts of appeals have upheld it.[8]

---

[6] *See, e.g., Chandler v. State*, 230 S.W. 1003, 1004 (Tex. Crim. App. 1921) ("We do not wish to be understood as holding that there cannot be joint possession of the equipment for the manufacture of liquor…."); *Huggins v. State*, 177 S.W.2d 269, 269-70 (Tex. Crim. App. 1944) (it was not the law that the defendant was required to be in exclusive possession of the whiskey, only care, control, and management was required, and trial court did not err in refusing to instruct the jury that they had to find his possession was exclusive); *Bennett v. State*, 271 S.W.2d 284, 285 (Tex. Crim. App. 1954) ("The trial court correctly charged the jury that possession [of liquor under the Texas Liquor Control Act] means to exercise control over; that possession need not be exclusive and that ownership was not essential to possession."); *King v. State*, 335 S.W.2d 378, 379 (Tex. Crim. App. 1959) (finding it immaterial whether defendant possessed marijuana alone or jointly with her husband); *Ochoa v. State*, 444 S.W.2d 763, 765 (Tex. Crim. App. 1969) ("A narcotic drug may be jointly possessed by two or more persons.").

[7] *Herndon v. State*, 787 S.W.2d 408, 409 (Tex. Crim. App. 1990); *Travis v. State*, 638 S.W.2d 502, 503 (Tex. Crim. App. [Panel op.] 1982); *Collini v. State*, 487 S.W.2d 132, 135-36 (Tex. Crim. App. 1972).

[8] *Corpus v. State*, 30 S.W.3d 35, 41 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (upholding challenge to State's closing argument that two parties can jointly possess an object as a correct statement of the law); *Edwards v. State*, No. 05-08-00686-CR, 2010 WL 2636133, at *7 (Tex. App.—Dallas July 2, 2010, pet. ref'd) (not designated for publication) (describing State's *voir dire* as "accurately point[ing] out that appellant had to knowingly possess the firearm, but that the possession could be joint or as a party."); *Castro v. State*, No. C14-89-00540-CR, 1993 WL 282789, at *8 (Tex. App.—Houston [14th Dist.] July 29,

It is not enough to allow the parties to explain this legal concept in *voir dire* or jury argument. An instruction is necessary. "[I]t is the function of the charge to lead and to prevent confusion."[9] "[T]he jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby."[10] The jury is not an expert on legal terms of art.[11] This Court held in *Madden v. State*, that the jury cannot be expected to wrestle with whether the totality of certain facts constitute "reasonable suspicion."[12] Similarly, it is not equipped to decide whether the concept of "possession" includes joint or sole possession. That is a legal question. Without instruction, a lay person could easily equate "*actual* care, custody, control, or management" with *exclusive* care, custody, control, or management.[13] Even

---

1993, no pet.) (not designated for publication) (closing argument, though referencing law of parties, was attempt to show that possession of a controlled substance need not be exclusive and was proper). Similarly, jurors who refuse to apply the law of joint possession should be struck for cause on the basis of having a "prejudice against any phase of the law upon which the State is entitled to rely for conviction." TEX. CODE CRIM. PROC. art. 35.16(b)(3).

[9] *Reeves v. State*, 420 S.W.3d 812, 818 (Tex. Crim. App. 2013) (quoting *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977)).

[10] TEX. CODE CRIM. PROC. art. 36.13.

[11] *Madden v. State*, 242 S.W.3d 504, 511 (Tex. Crim. App. 2007).

[12] *Id.*; *but see* TEX. CODE CRIM. PROC. art. 38.22, §§ 6, 7 (requiring jury to wrestle with issues of voluntariness of a defendant's confession); TEX. PENAL CODE § 38.06 (including as an element for offense of escape whether the person is "lawfully detained").

[13] *See* WEBSTER'S NEW COLLEGIATE DICTIONARY at 918 (defining possession as "the act of having or taking into control" and including "ownership.").

jurors familiar with the idea of joint custody and control from their own experiences may mistakenly believe—without instruction to the contrary—that the criminal law requires more. As the court of appeals concluded, "jurors should not be left to their own devices to decide whether 'possession' includes 'joint possession.'"[14]

As with the law of parties, if joint possession can legally apply to the offense and is supported by the evidence, the State should be entitled to submission of this legal theory to the jury.[15] In *State ex rel. Weeks*, this Court explained that it is the prerogative of the State to choose which offense to pursue and that this charging decision then becomes the law applicable to the case.[16] This also holds true for legal theories available to prove the charged offense, like the law of parties, which is not required to be pled in the charging instrument.[17] While joint possession and the law

---

[14] *De La Torre*, 546 S.W.3d at 427.

[15] *See In re State ex rel. Weeks*, 391 S.W.3d 117, 124 (Tex. Crim. App. 2013). There is some precedent for treating the theories of party liability and joint possession in a similar manner. At one time, trial courts were required to instruct jurors in circumstantial-evidence cases that they must be reasonably and morally certain that the defendant, *and no other*, committed the offense alleged. *Galvan v. State*, 598 S.W.2d 624, 630 (Tex. Crim. App. 1979). But based on rulings from this Court, if there were evidence supporting either the law of parties or joint possession, the phrase "and no other" would be omitted so as to not commit "error against the State." *Id*.

[16] *State ex rel. Weeks*, 391 S.W.3d at 123.

[17] *Id*. at 124.

of parties are not identical,[18] they have some overlap and often arise together as legal theories in support of guilt.[19]

Additionally, the law governing the hypothetically correct jury charge supports inclusion of a joint-possession instruction. "A hypothetically correct jury charge is one that 'accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'"[20] As noted above, a charge that included joint possession accurately sets out the law. At least one court of appeals has held that it is authorized by the indictment even when not specifically alleged.[21] A charge that lacked the

---

[18] In order to prove that an accused acted as a party to the offense under the most common theory, the State must prove that the accused solicited, encouraged, directed, aided, or attempted to aid another person to commit the offense. TEX. PENAL CODE § 7.02(a)(2). For joint possession, the State has no burden to prove conduct that furthers another person's commission of the offense. A defendant may actively discourage another's participation and still jointly possess the contraband with that person.

[19] *See, e.g., Hicks v. State*, 489 S.W.2d 912, 913 (Tex. Crim. App. 1973) ("The jury in this case was instructed on the law of principals and that possession of drugs need not be exclusive. The evidence as summarized above is sufficient to support the jury's verdict and to show the appellant's joint possession of the amphetamine which he was charged with possessing.").

[20] *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

[21] *Duncan v. State*, 680 S.W.2d 555, 560 (Tex. App.—Tyler 1984, no pet.).

joint possession instruction would have the effect of restricting the State's theory of liability to sole possession.

In the instant case, Appellant was found in a car with other passengers, the closest of whom may also have been under the influence of cocaine. The jurors need not have wasted any time deciding whether Appellant's front passenger had slightly greater possession than he did. While they had to decide if Appellant was in possession, they should not be put to the false test of having to select only one person who was. They should not have to deliberate whether the standard for conviction is sole or joint possession.[22] Jurors should receive that law from the court.

A joint possession instruction is not a comment on the weight of the evidence.

There are good reasons to instruct the jury on joint possession; there is no legitimate reason not to. In *Walters v. State*, this Court stated that "special, non-statutory instructions, even when they relate to statutory offenses or defenses, generally have no place in the jury charge."[23] Applying this Court's earlier decision

---

[22] *Cf. Giesberg v. State*, 984 S.W.2d 245, 250 (Tex. Crim. App. 1998) (finding that because alibi, as a negation of an element of the State's case, is sufficiently embraced by the general charge, there is ample room within the charge to effectively argue the defensive issue).
[23] 247 S.W.3d 204, 211 (Tex. Crim. App. 2007).

in *Giesberg v. State*,[24] the *Walters* Court explained:

> generally speaking, neither the defendant nor the State is entitled to a special jury instruction relating to a statutory offense or defense if that instruction (1) is not grounded in the Penal Code, (2) is covered by the general charge to the jury, and (3) focuses the jury's attention on a specific type of evidence that may support an element of an offense or a defense. In such a case, the non-statutory instruction would constitute a prohibited comment on the weight of the evidence.[25]

One court of appeals has held that it is error to submit a joint-possession instruction because it is non-statutory.[26] Here, the instruction is obviously not statutory. It likely originates from common law. Nonetheless, it is not a comment on the weight of the evidence because it is not covered by the general charge and does not unnecessarily focus attention on particular evidence. Without direction from the court's charge, lay jurors would have no neutral source of law with which to counter the arguments of other jurors who insist that exclusive possession is required. It cannot be definitively inferred from the remainder of the charge.

---

[24] 984 S.W.2d 245 (Tex. Crim. App. 1998).

[25] *Walters*, 247 S.W.3d at 212.

[26] *Ross v. State*, No. 02-11-00439-CR, 2013 WL 43992, at *6 (Tex. App.—Fort Worth Jan. 4, 2013, pet. ref'd) (not designated for publication); *but see Hutchison v. State*, 424 S.W.3d 164, 174 (Tex. App.—Texarkana 2014, no pet.) (State was entitled to joint- possession instruction even though it was not the party to have introduced the evidence supporting it); *Valentine v. State*, No. 01-06-00522-CR, 2007 WL 3246384, at *7 (Tex. App.—Houston [1st Dist.] Nov. 1, 2007, no pet.) (not designated for publication) (joint-possession instruction was substantially correct statement of the law).

As to the third factor, while the instruction mentions a circumstance raised by the evidence—possession by two or more people—it does so no more than any instruction in the charge could be said to refer to evidence in the case. It might refer to testimony that the cocaine was located between the front two occupants. It could remind jurors that there were three or four people in the car. That means it does not effectively focus on either, and thus is not an improper comment on the evidence.

Finally, contrary to Appellant's contention, the joint-possession instruction is not an evidentiary sufficiency device lacking a statutory basis. The instruction "intent can be inferred from acts done or words spoken" is one such device.[27] As this Court explained in *Brown v. State*, an appellate court might rely on the inference to uphold the jury's verdict as rational, but it is improper to instruct jurors on it because it is only one of a number of reasonable inferences the jury might make and selecting one singles it out for the jury's particular attention and gives it the force of law.[28] Similarly, selecting one among several permissible definitions of the common term "operate" in a DWI trial constituted an improper comment on the weight of the

---

[27] *Brown v. State*, 122 S.W.3d 794, 799 (Tex. Crim. App. 2003).
[28] *Id*. at 800.

evidence.[29] While such a definition is an appropriate evidentiary sufficiency tool, the jury is not required to apply a particular definition and to provide them one impinges on their role to assign the term "any meaning" acceptable in common parlance.[30]

The instruction at issue here is more than a tool of sufficiency review.[31] It is the expression of a substantive theory of guilt on which the State was entitled to rely. The jury was not free to decide whether possession could be joint. They were to decide whether the facts rose to that level. And without the instruction the jury might never contemplate the issue.[32]

---

[29] *Kirsch v. State*, 357 S.W.3d 645, 652 (Tex. Crim. App. 2012); *see also Green v. State*, 476 S.W.3d 440, 446 (Tex. Crim. App. 2015) (holding that the terms "penetration" and "female sexual organ" are common terms that jurors are free to interpret according to common usage).

[30] *Kirsch*, 357 S.W.3d at 652.

[31] A better analogy to this case than *Kirsch* is *Grotti v. State*, where this Court held the hypothetically correct jury charge should define "death" within the medical context, where the defendant was the attending physician and the jury had to determine whether the victim's death, as it is medically defined, occurred before or after the defendant's conduct. 273 S.W.3d 273, 282 (Tex. Crim. App. 2008). Likewise, here, the legal definition provides the appropriate context.

[32] *See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 322-23 (1989), *abrogated on other grounds*, (instructions in death penalty case must provide the jury with a vehicle for expressing reasoned moral response to defendant's mitigation evidence).

Alternatively, even if error, it was harmless.

Since it found the joint-possession instruction was properly given, the court of appeals has not had an opportunity to address harm. Remand for a harm analysis would be appropriate if this Court finds error. Nevertheless, no egregious harm is shown.[33] At most, the error is in taking the final step of including a joint-possession instruction in the charge. Nothing prevents the advocates from informing the jurors of this law—which is what happened here. Both the prosecutor and defense counsel instructed the panel on joint possession during *voir dire*.[34] The prosecutor also reminded jurors of it again in closing argument.[35] Based on these circumstances alone, any error is not egregious. Also, because the clear evidence supports conviction under either a joint or sole possession theory, there is no egregious harm. Based on their dilated pupils, both Appellant and his front-seat passenger appeared to have recently ingested narcotics, and therefore were in possession.[36] Moreover, the cocaine was found closest to them and was out in the open.[37] And Appellant's

---

[33] With no objection to the joint-possession instruction, the proper standard is egregious harm. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).
[34] 2 RR 63, 106-07.
[35] 3 RR 45.
[36] 3 RR 16.
[37] 2 RR 180-81; SX 2, 3.

admission to be the owner of the car and driver establish still more connections between himself and the cocaine—more than anyone else. In light of this evidence, the joint-possession instruction did not result in egregious harm.

ISSUE 2

> The trial court did not abuse its discretion in denying an instruction on mere presence. The insufficiency of mere presence was already inferable from the general charge. Like the charge "knowledge is not enough to convict," it singled out one of many factors the jury had to consider, giving it undue emphasis.

At the charge conference, Appellant specified only that he wanted a "mere presence" instruction, but presumably the trial court understood this as a request for the charge, "Mere presence at a place where narcotics are found is not enough to constitute possession." The trial court did not abuse its discretion in denying it.

Appellant's requested instruction was already covered by the general charge

Just as it is the law that two people can possess something at the same time, it is also the law that just being present where contraband is found does not constitute possession.[38] The difference between these instructions is that the second is already implicit in the definition of possession.[39] As one court of appeals put it, "[b]y

---

[38] *Martin v. State*, 753 S.W.2d 384, 386 (Tex. Crim. App. 1988).

[39] The State Bar Pattern Jury Charge Committee's commentary cites a few cases reaching this conclusion. TEXAS CRIMINAL PATTERN JURY CHARGES, Intoxication, Controlled Substance & Public Order Offenses 76-77 (2016) (citing *Williams v. State*, 906 S.W.2d 58, 64 (Tex. App.—Tyler 1995, pet. ref'd) and *Gilmore v. State*, No. 02-06-00302-CR, 2008 WL 706621, at *7 (Tex. App.—Fort Worth Mar. 13, 2008, no pet.)). The pattern instructions nonetheless include charges on joint possession, mere presence, and knowledge alone based on the conclusion that "in at least some situations juries should be

definition, actual care, custody, control, or management requires more than mere proximity."[40] The mere presence instruction is one way of restating the statutory definition in reverse. It is necessarily covered by the general charge. Further, there is no logical end to instructions of this kind. The court just as well could have instructed the jurors that mere ownership of the car does not constitute possession of the drugs found inside it or that knowledge that others possess drugs is not sufficient to convict the defendant of possession.

Moreover, these variations fall prey to the problem in *Brown*. They single out one particular avenue to acquittal, unnecessarily focusing attention on it. Despite intending to provide a helpful reminder or useful example to educate lay jurors, this focused attention can just as easily mislead them.[41] Jurors may mistakenly believe

---

provided with something more than the bare-bones statutory definition of possession." PATTERN JURY CHARGES, Intoxication, Controlled Substance & Public Order Offenses at 77.

[40] *Buchannan v. State*, No. 05-93-01781-CR, 1995 WL 221650, at *6 (Tex. App.—Dallas Apr. 10, 1995, no pet.) (not designated for publication). This Court came to the same conclusion years earlier in *Dabbs v. State*, 507 S.W.2d 567, 570 (Tex. Crim. App. 1974).

[41] *Perovich v. United States*, 205 U.S. 86, 92 (1907) ("Singli[ng] out a single matter and emphasizing it by special instruction as ofter tends to mislead as to guide a jury. Doubtless the isolated fact that [the victim] had not been seen would not of itself establish the fact of his death. It is only a circumstance which, taken in connection with the other facts in the case, tends to prove the death. It is merely one link in a long chain, and the court is seldom

that the circumstances that have not been singled out are unimportant or that the singled-out circumstance deserves their particular attention. Because the substance of the instruction was already conveyed by the general charge and the requested charge was potentially misleading, the trial court did not abuse its discretion in refusing it.

McShane and *Golden* do not require submission of this instruction

Two of this Court's cases initially seem to support Appellant's argument, but ultimately do not require submission of a mere presence instruction in this context.[42]

---

called upon by special instructions to single out any single link in a chain, and affirm either its strength or weakness.").

[42] This Court has not definitively required or forbidden the instruction that mere presence with an accomplice is insufficient to make one a party to the offense. The instruction is frequently given, and this Court has said in dicta that instructions that have included this language are proper. *See Nava v. State*, 415 S.W.3d 289, 295 (Tex. Crim. App. 2013); *Vasquez v. State*, 389 S.W.3d 361, 371 (Tex. Crim. App. 2012) (noting that the instruction was "crucial for the defense" and acknowledging that it is never included in the application paragraph, suggesting that it may nonetheless be proper to include in the abstract). At other times the Court has relied on the fact that the jury was so instructed to overrule the denial of other instructions. *Reyes v. State*, 741 S.W.2d 414, 428 (Tex. Crim. App. 1987) (explaining that mere presence instruction "adequately protect[ed] appellant's rights."); *LeDuc v. State*, 593 S.W.2d 678, 685 (Tex. Crim. App. 1979); *see also Smith v. State*, 676 S.W.2d 379, 389 (Tex. Crim. App. 1984) (finding no reversible error in charge that included mere presence instruction); *Gonzales v. State*, 466 S.W.2d 772, 775 (Tex. Crim. App. 1971) (finding no reversible error in charge that failed to include mere presence instruction where circumstantial evidence instruction "adequately protect[ed] appellant's rights."). In the context of the law of parties—in contrast with accomplice-witness

This Court's 1975 decision in *McShane v. State* states that when raised by the evidence, a defendant is entitled to a charge that mere presence does not itself constitute possession.[43] At that time, however, the defense was entitled to submission of every defensive theory—even if it merely negated an element of the State's case.[44] Since *Giesberg* and *Walters*, however, non-statutory issues that are already covered by the general charge can constitute a comment on the weight of the evidence. Consequently, *McShane* is no longer good law for that proposition.[45]

Appellant also relies inferentially on this Court's 1993 decision in *Golden v. State*,[46] but that case is distinguishable. *Golden* held that it was error not to charge

---

corroboration discussed *infra*—a mere presence instruction would seem to be just as much a comment on the weight as it is in the joint possession context.

[43] 530 S.W.2d 307, 308 (Tex. Crim. App. 1975); *see also Mitchell v. State*, 650 S.W.2d 801, 809 (Tex. Crim. App. 1983) (relying on *McShane*).

[44] *Walters*, 247 S.W.3d at 209; *Goldman v. State*, 468 S.W.2d 381, 383 (Tex. Crim. App. 1971) (defendant had the legal right to have his defensive theory submitted in an affirmative manner to the jury).

[45] *McShane*'s pronouncement that it was error to deny the mere presence instruction is arguably dicta since the case was reversed for failure to instruct the jury on a lesser-included offense. 530 S.W.2d at 308. It also fails to articulate why it was error to deny the instruction in *McShane* but not in *Dabbs*, 507 S.W.2d at 570, where the Court held a year earlier that a mere presence instruction was necessarily included in the general charge instructing the jury that possession meant "actual care, custody, control, or management" and required the jury to find possession in order to convict.

[46] 851 S.W.2d 291, 295 (Tex. Crim. App. 1993).

the jury that mere presence of the defendant with an accomplice shortly before or after the commission of the offense was insufficient to corroborate accomplice witness testimony.[47] That instruction is not already covered by the general charge since it is not just a rephrasing of what constitutes corroboration. The only statutory guidance jurors have for corroboration is that the non-accomplice evidence must "tend to connect" the defendant to the commission of the crime and that proof that the offense occurred is not enough.[48] Because it is entirely reasonable to conclude that a defendant's presence with those who committed the crime around the time of its commission is something that "tend[s] to connect" him to the commission of the crime, the jury should be told it is insufficient corroboration. There is no such necessity for the instruction at issue here.

Alternatively, even if error not to so instruct the jury, it was harmless.

Remand for a harm analysis would be appropriate if this Court finds error. But should this Court reach the issue, even though the court of appeals did not, it would not find even some harm in light of the entire jury charge, the state of the evidence, jury arguments, and other relevant information. As mentioned above, "when a

---

[47] *Id*.
[48] TEX. CODE CRIM. PROC. art. 38.14.

refused charge is adequately covered by the charge given, no harm is shown."[49] The definition in the charge of "actual care, custody, control, or management" gave the defense a foothold to argue that merely being present does not constitute possession. Defense counsel informed the panel of this in *voir dire*.[50] Furthermore, there was virtually no possibility that the jury relied solely on Appellant's mere presence in the vehicle such that the absence of that instruction would have mattered. Appellant admitted the car was his, and he was the driver. The cocaine was so plainly out in the open that the officer noticed it almost immediately. And Appellant appeared to be under the influence of a narcotic at the time. The State relied on these same circumstances in its closing argument,[51] and there is no reason to think the jury would have disbelieved all the other connections between Appellant and the cocaine—other than his presence in the car.

CONCLUSION

Unlike the mere presence charge, the joint possession instruction was not otherwise a part of the general charge and its absence would have deprived the State of a theory of liability on which it was entitled to rely. Holding that it is error to

---

[49] *Baldree v. State*, 784 S.W.2d 676, 682 (Tex. Crim. App. 1989).
[50] 2 RR 107.
[51] 3 RR 46.

instruct jurors on the law of joint possession puts an inappropriate burden on lay people to determine what is the law. They should receive that from the trial judge. Furthermore, because the jury charge adequately conveyed the substance of the mere presence instruction and that instruction had the potential to mislead jurors to focus on one issue to the detriment of other equally important issues, the trial court properly denied the instruction.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals affirm the judgment of the court of appeals.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 5,507 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of January, 2019, the State Prosecuting Attorney's Brief on the Merits was served electronically on the parties below.

The Honorable Steven J. Lieberman
Counsel for Lisandro Beltran de la Torre
712 Main, Suite 2400
Houston, Texas 77002
slieber699@aol.com

The Honorable Jay Johannes
County Attorney, Colorado County
400 Spring St., Suite 204
Columbus, Texas 78934
jay.johannes@co.colorado.tx.us

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney